COMMONWEALTH of VIRGINIA

*DEPARTMENT OF ENVIRONMENTAL QUALITY*

# STATE WATER CONTROL BOARD ENFORCEMENT ACTION

## SPECIAL ORDER BY CONSENT

## ISSUED TO

## ORANGE PARTNERS, LLC – KERNSTOWN COMMONS COMMERCIAL DEVELOPMENT PROJECT

**NO PERMIT**

### SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code § 62.1-44.15(8a), 62.1-44.15(8d) between the State Water Control Board and Orange Partners, LLC for the purpose of resolving certain alleged violations of environmental laws and regulations.

### SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.

2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent Special Order.

6. "Orange Partners" means Orange Partners, LLC a Virginia limited liability company in good standing located at Winchester, Virginia.

7. "The Site" means the Kernstown Commons Commercial Development Project.

8. "ACOE" means the United States Army Corps of Engineers, Norfolk District, Western Virginia Regulatory Section.

9. "SMP" or "Plan" mean Site Mitigation Plan.

**SECTION C: Findings of Fact and Conclusions of Law**

1. Orange Partners owns portions of the Site and is developing portions of the Site located south of Winchester near Kernstown, Frederick County, Virginia.

2. By letter dated, June 6, 2006, a consultant retained by Orange Partners, Wetlands Alternatives, notified DEQ of apparent unauthorized impacts to unnamed tributaries to Opequon Creek associated with the development of the Site.

3. In response to the June 6, 2006 letter notification from Wetlands Alternatives, on June 30, 2006, DEQ staff and ACOE inspected the Site. During the inspection, staff observed that in order to construct the Site area's stormwater management basin, two intermittent steam channels were diverted into approximately 575 feet of newly constructed 12 ft. X 6 ft. box culvert and approximately 500 feet were relocated impacting an area of approximately 1,225 linear feet. DEQ asserts that the area impacted was state waters/state jurisdictional streambed. Orange Partners and its consultants asserts that the area impacted was drainage ditches maintained by the Virginia Department of Transportation ("VDOT") pursuant to drainage easements granted to VDOT by Orange Partners and its predecessors in title relating to the construction of Virginia State Route 37 in the vicinity of the Site. DEQ asserts that the impact to the affected area resulted in the discharge of pollutants into state waters and the alteration of physical, chemical or biological properties of state waters. Orange Partners asserts that the impact to the affected area did not result in the discharge of pollutants into state waters and the alteration of physical, chemical or biological properties of state waters based on the advice of their consultants indicating it was not State waters.

4. DEQ issued NOV No. W2006-07-V-0001 on July 6, 2006, to Orange Partners for conducting in-steam construction on two intermittent stream sections without a permit in violation of VA Code 62.1-44.15:5 and 9 VAC 25-210-50 which prohibit such actions without a permit.

5. On August 8, 2006, representatives of Orange Partners met with DEQ in an informal conference to discuss the violations cited in the NOV. During the meeting, DEQ requested a plan and schedule of corrective actions to address the alleged violations.

Without admitting any liability regarding the alleged violations, Orange Partners agreed to submit a plan and schedule of corrective actions for discussion with DEQ.

6. On October 26, 2006, representatives of Orange Partners met with DEQ to discuss the NOV and site mitigation.

7. By letter dated January 18, 2007, Orange Partners provided DEQ with a status report on its Stream Mitigation Proposal ("SMP") including identification of a proposed mitigation/compensation area to address the alleged unauthorized impacts.

8. On January 31, 2007, DEQ received Orange Partners' Stream Mitigation Proposal ("SMP") to address the alleged unauthorized impacts to the Site by providing mitigation/compensation for the alleged stream channel impacts and by establishing riparian buffers in an area of Opequon Creek protected by an easement to be granted on the mitigation area.

9. Following its revisions by Orange Partners to incorporate DEQ's comments, on April 23, 2007, DEQ approved Orange Partners' SMP. The SMP has been incorporated into Appendix A of the Order.

10. Orange Partners, asserts that at no time during construction of this project did it ever intend to act improperly or outside of the State Water Control Law and relied solely on their engineering/environmental consultants to guide them through the environmental regulatory process. Orange Partners has agreed to undertake its SMP and consent to this Special Order by Consent to avoid the prospective costs of litigation involving the matter, and therefore, consents to the terms of this Special Order by Consent as stated herein.

SECTION D: Agreement and Order

1. Accordingly, the Board, by virtue of the authority granted it in Va. § 62.1-44.15(8a) and (8d), orders Orange Partners, and Orange Partners agrees, to perform the actions described in Appendix A of this Order.

2. Within 30 days of the effective date of this Order, Orange Partners shall pay a civil charge of **$15,600** in settlement of the alleged violations cited in this Order. Payment shall be by check, certified check, money order, or cashier's check payable to "Treasurer of Virginia" and delivered to:

   Receipts Control
   Department of Environmental Quality
   Post Office Box 1104
   Richmond, Virginia 23218

   Orange Partners shall also include its federal identification number (FIN) with the check, certified check, money order, or cashier's check.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of Orange Partners, for good cause shown by Orange Partners, or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those alleged violations specifically identified herein in Section C. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, Orange Partners admits the jurisdictional allegations in the Order, but does not admit the factual allegations or legal conclusions contained herein.

4. Orange Partners consents to venue in the Circuit Court of the Frederick County or any civil action taken to enforce the terms of this Order.

5. Orange Partners declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by Orange Partners to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. Orange Partners shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Orange Partners shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Orange Partners shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may

delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

a. the reasons for the delay or noncompliance;

b. the projected duration of any such delay or noncompliance;

c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Director of the Valley Regional Office within 24 hours of learning of any condition above, which Orange Partners intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and Orange Partners. Notwithstanding the foregoing, Orange Partners agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

a. Orange Partners petitions the VRO Director to terminate the Order after it has completed all requirements of this Order, and the Regional Director determines that all requirements of the Order have been satisfactorily completed; or

b. The Director, his designee, or the Board may terminate this Order in his or its sole discretion upon 30 days written notice to Orange Partners.

Termination of this Order, or of any obligation imposed in this Order, shall not operate to relieve Orange Partners from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. The undersigned representative of Orange Partners certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Orange Partners to this document. Any documents to be submitted pursuant to this Order shall be submitted by a responsible official of Orange Partners.

13. By its signature below, the Orange Partners, L.L.C. voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of 28 September, 2007.

Amy T. Owens, Regional Director
Department of Environmental Quality

Orange Partners, LLC voluntarily agrees to the issuance of this Order.

By: _____

Title: MEMBER

Date: 6-29-07

Commonwealth of Virginia
City/County of Frederick

The foregoing document was signed and acknowledged before me this

29 day of June, 2007, by Lisa Limoges,
(name)

who is member of Orange Partners, LLC on behalf of the Company.

(title)

Notary Public

My commission expires: June 30, 2008.

**APPENDIX A**
**SCHEDULE OF COMPLIANCE**
**ORANGE PARTNERS, LLC**

1. Orange Partners shall comply with the provisions contained in the approved SMP. The approved SMP is incorporated herein by reference and is enforceable under this Order. On April 23, 2007, DEQ approved Orange Partner's SMP. The SMP, which incorporates a mitigation/compensation area, addresses the unauthorized impacts to approximately 1225 linear feet of the unnamed tributaries to Opequon Creek at the Site. The mitigation/compensation area is located approximately 2.3 miles northwest of the Site and bounds an agricultural pasture along Opequon Creek in Frederick County. The SMP includes stream bank enhancement and the protection, in the form of a restrictive easement, of 2125 linear feet of stream channel with 75 foot buffers on either side of the stream and 400 linear feet with 50 foot buffers. In addition to these measures, livestock exclusion (fencing) is to be installed along the length of the stream channel and associated buffer. The livestock use and stream impacts associated with agricultural activity along Opequon Creek has resulted in stream impacts such as sediment deposition, excess nutrient and bacterial levels. The mitigation/compensation area is contained within the Opequon Creek Watershed TMDL Implementation Plan. The SMP is consistent with the goals and objectives of the TMDL Implementation Plan.

2. **By July 1, 2007**, Orange Partners shall finalize with the property owner the terms and conditions of the easement for the mitigation/compensation area as identified in the SMP.

3. **By October 26, 2007**, Orange Partners shall complete the survey of the SMP's mitigation/compensation area stream channel boundaries and stream bank cross sections and submit the survey drawings to DEQ for review and approval.

4. **By November 1, 2007**, Orange Partners shall remove livestock from the SMP's mitigation/compensation area and the entire pasture area.

5. **By December 31, 2007**, Orange Partners shall complete installation of stream bank stabilization measures and excavation of the stock pond in accordance with the approved SMP.

6. **By April 1, 2008**, Orange Partners shall complete plantings for the riparian buffer and installation of fencing in the SMP's mitigation/compensation area.

7. **Within 60 days** of completing plantings and installation of fencing in the mitigation/compensation area, **but no later than June 1, 2008,** Orange Partners shall submit to DEQ a survey and plat of the SMP's mitigation/compensation area as performed and certified by a licensed land surveyor or professional engineer. Surveys

or plans of the mitigation/compensation area shall be recorded with a preservation instrument and proof of recordation submitted to DEQ.

8. **Within 60 days** of completing the mitigation/compensation project, **but no later than August 1, 2008**, Orange Partners shall prepare and submit the as-built ground survey report for the mitigation/compensation project to show changes or deviations from the approved SMP.

9. Orange Partners shall continue the success monitoring of the mitigation/compensation area as presented in the approved SMP and shall submit annual reports **by January 10** of each year in accordance with the approved SMP.

**GENERAL REQUIREMENTS**

10. No later than **14 days** following a date identified in the above schedule of compliance Orange Partners shall submit to DEQ's Valley Regional Office a written notice of compliance or noncompliance with the scheduled item. In the case of noncompliance, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled item.